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No. 89-1271

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, *et al.*,  
*Petitioners,*

v.

SAMUEL K. SKINNER,  
SECRETARY OF TRANSPORTATION,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

MARK ROTH  
JOE GOLDBERG  
80 F Street, N.W.  
Washington, D.C. 20001

WALTER KAMIAT  
LAURENCE GOLD  
(Counsel of Record)  
815 16th Street, N.W.  
Washington, D.C. 20006  
(202) 637-5390

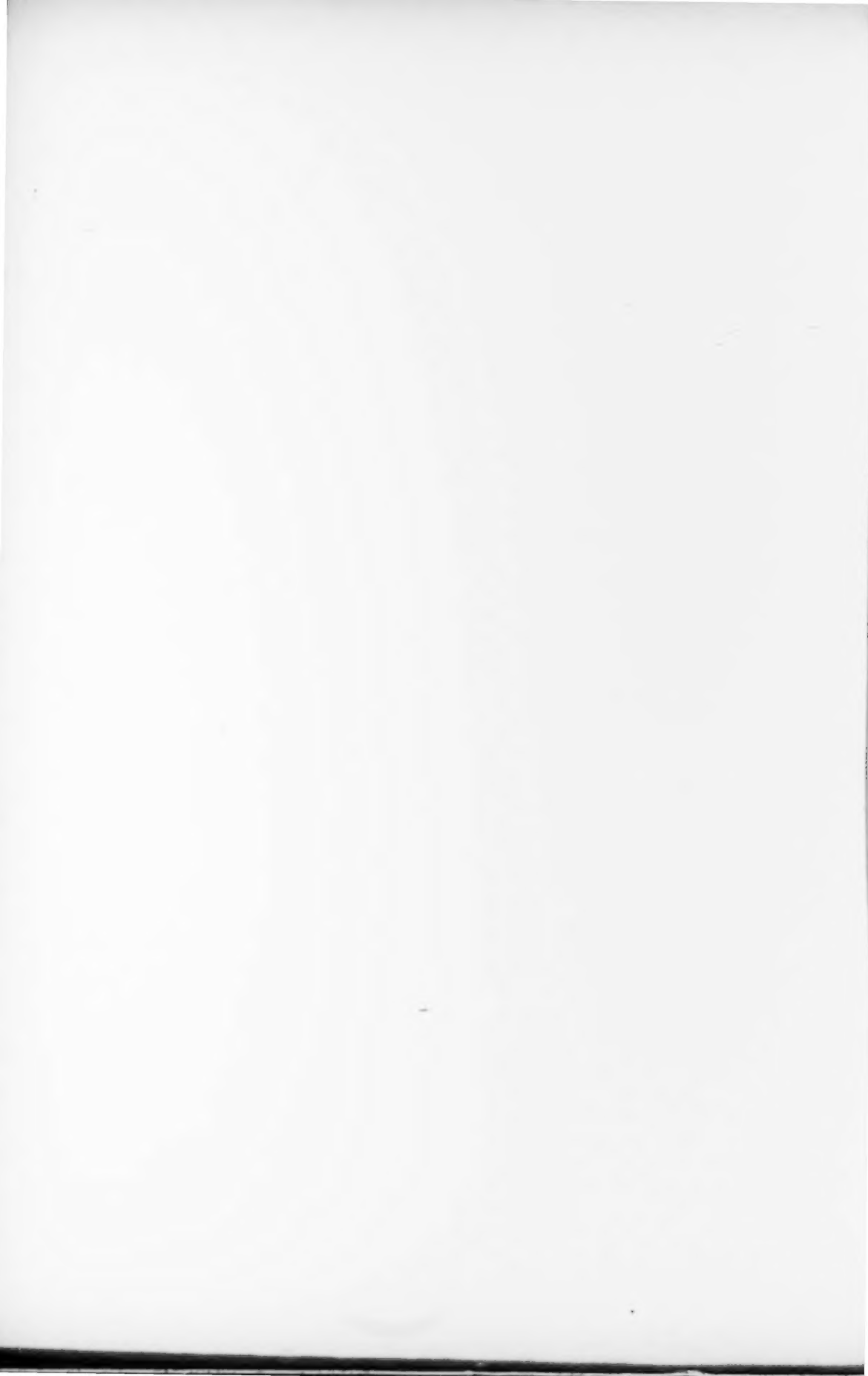


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PETITIONERS' REPLY BRIEF

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ARGUMENT

1. Under this Court's jurisprudence the constitutionality of *suspicionless* search programs turns on whether the program—in its particulars and in its context—can properly be characterized as “minimally intrusive” into an individual's legitimate privacy interests.<sup>1</sup> In our peti-

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<sup>1</sup> See, e.g., *Skinner v. Railway Labor Executives' Association*, — U.S. —, 57 L.W. 4324, 4330 (March 21, 1989) (noting that it is a precondition to a suspicionless search program's validity that “privacy interests implicated . . . are minimal”); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) (“exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated are minimal”); see also *National*

tion for *certiorari* ("Pet."), we demonstrated that, by any fair assessment, drug-testing programs that subject innocent employees to permanent regimes of recurring, random, unannounced, and closely-monitored urine collection drug testing at the insistence of the state—such as the program at issue here—are far more intrusive than the searches this Court has denominated "minimally intrusive". Pet. 11-14.

The government's brief ("Gov. Br.") responds to our showing in this regard in a half page discussion which argues two essentially irrelevant points. Gov. Br. 6.

*First*, the government asserts that each urine test at issue, if evaluated in isolation, "involves no greater physical restraint . . . than the [post-accident testing] in *Skinner*." *Id.* This carefully ignores that the "intrusiveness" determination requires an assessment of the overall levels of anxiety, fear, annoyance and other "subjective" or "psychological intrusions" into privacy and dignity generated by the program as a whole, and not only an assessment of the objective "physical restraint" worked by the test itself.<sup>2</sup> Indeed, *Skinner* recognizes that precisely because urine testing programs "require employees to perform an excretory function traditionally shielded by great privacy", such searches will "not be characterize[d] . . . as minimal in most contexts". 57 L.W. at 4330 (emphasis added). And the difference between the program here and the one in *Skinner* is that the program here works a far deeper psychological intrusion on pri-

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*Treasury Employees Union v. von Raab*, — U.S. —, 57 L.W. 4338, 4342-4343 n.2 (March 21, 1989) (noting factors which "significantly minimize [testing] program's intrusion on privacy interests").

<sup>2</sup> See *Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (focusing on "anxiety", "fright", "annoyance"); *United States v. Martinez-Fuerts*, 428 U.S. 543, 558-580 (1976) (focusing on levels of "concern", "surprise", and "offense"); see also *United States v. Ortiz*, 422 U.S. 891, 894-895 (1975).

vacy and is, in fact, designed and administered to create an ever-present state of apprehension. Pet. 11-14.

*Second*, the government asserts that the instant program is minimally intrusive because each employee is given an initial notice of the program's existence, informing her that she will be subject to state-mandated urine collections, without individualized warning or reason, for the remainder of her worklife. Gov. Br. 6 & n.3. This makes a travesty of this Court's recognition that advanced notice of a drug test may "reduc[e] to a minimum any unsettling show[] of authority that may be associated with unexpected intrusions on privacy," *von Raab*, 57 L.W. at 4342 n.2. Plainly, *von Raab* refers to a particularized notice of the time of a particular test. Nothing could better illustrate the government's total disdain for the human feelings of the covered employees than the assertion that notifying those employees that, hereafter and forever, they will be routinely made targets of "unexpected intrusions on [their] privacy", reduces rather than exacerbates the invasion of their legitimate privacy expectations.<sup>3</sup>

2. In ultimate terms, the government's theory of this case is as straightforward as it is fallacious: *Skinner* and *von Raab* decide that all repetitive, unannounced and random drug-testing programs of employees in safety-sensitive positions of the kind at issue here meet the Constitution's requirements.<sup>4</sup>

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<sup>3</sup> *United States v. Martinez-Fuerte* does not legitimize surprise searches if the state simply announces that it is engaged in such a practice, as the government implies. See Gov. Br. at 6 n.3. In *Martinez-Fuerte*, the Court noted that a fixed checkpoint stop program had reduced surprise because the checkpoint locations were well-known and because the checkpoints were clearly marked so that a motorist approaching the check point received advance warning. 428 U.S. at 558-559. Here, the program, as the government concedes, is designed to test by surprise. See Gov. Br. at 3.

<sup>4</sup> Indeed, it is only on that understanding that the government is able to defend the court of appeals decisions since *Skinner* and

But neither *Skinner* nor *von Raab* involved such drug-testing programs. And, in those cases, it was the government that was the first to note that repetitive, unannounced and random programs are far more intrusive than the programs then at issue. See Pet. at 9-14.

The government's facile denial of what it so recently recognized can perhaps be charitably ascribed to selective amnesia. But nothing can excuse the government's trivialization of the substantial intrusions the programs at issue here work on legitimate—indeed basic—privacy interests.

\* \* \* \*

The sum of the matter is this. In our *certiorari* petition, we said:

In large part the legitimacy—and the moral force—of judicial review rests on the assurance that the courts in interpreting the Constitution will engage in reasoned and principled decision making. Approval of the wide-spread, highly intrusive search programs at issue here on the basis of lower court speculations on how far this Court intended to move the Fourth Amendment law in its *Skinner* and *von Raab* opinions does not, we submit, constitute such decision making.

[T]he decision as to whether the government may constitutionally require that individuals who are not suspected of any wrongdoing are to be subject to random, unannounced, and repeated drug testing should not be treated as a decision arrived at *sub*

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*von Raab* with a blanket assertion that these decisions have “uniformly applied” the proper analysis called for by this Court. Gov. Br. 5. That blanket assertion, moreover, attempts to cover some otherwise obvious analytic sins. For example, as we pointed out in our petition, Pet. 16, the Fourth Circuit, in *Thompson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989), validated a random testing program on the erroneous premise that the programs at issue in *Skinner* and *von Raab* were random programs. And, as we also pointed out, Pet. 18, the First Circuit, in *Guiney v. Roache*, 873 F.2d 1557 (1st Cir.), *cert. denied*, 110 S.Ct. 404 (1989), apparently decided the issue with literally no discussion.

*silentio* in *Skinner* and *von Raab*. Rather, it is an open issue that should be decided by this Court after squarely confronting the unique aspects of these unprecedented testing programs. [Pet. 9.]

That argument for a clear and definitive ruling on a major Fourth Amendment issue stands unrebutted.

### CONCLUSION

For the reasons stated in the petition for a writ of certiorari and in this reply brief the petition should be granted.

Respectfully submitted,

MARK ROTH  
JOE GOLDBERG  
80 F Street, N.W.  
Washington, D.C. 20001

WALTER KAMIAT  
LAURENCE GOLD  
(Counsel of Record)  
815 16th Street, N.W.  
Washington, D.C. 20006  
(202) 637-5390